



April 23, 2002

Mr. Gary Allmon Grimes
Schuereberg & Grimes
Wells Fargo Bank Building
120 West Main, Suite 201
Mesquite, Texas 75149

OR2002-2080

Dear Mr. Grimes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161605.

The Mesquite Independent School District (the "district"), which you represent, received a request for information relating to assaults and sexual harassment cases and incidents during the 1999-2000 and 2000-2001 school years. You claim that the requested information is excepted from disclosure under sections 552.026, 552.101, 552.102, and 552.114 of the Government Code and the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. We have considered the exceptions you raise and have reviewed the information you submitted.¹

FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1); see also 34 C.F.R. § 99.3 (defining personally identifiable information).

¹This letter ruling assumes that the submitted examples of responsive information are truly representative of that information as a whole. This ruling neither reaches nor authorizes the district to withhold any responsive information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978).

Section 552.114(a) of the Government Code requires the district to withhold "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. *See* Open Records Decision No. 634 at 6-8 (1995).

In this instance, you have submitted to this office documents that you claim are confidential under FERPA. Therefore, we will address the applicability of FERPA to these documents. You state that Exhibits B, D, and E contain information that relates to students of the district. Additionally, we have marked documents in Exhibit E that appear to have been hand-written by students and other information that appears to identify students. We note, however, that you have redacted all of the names of the individuals to whom the information in Exhibits B, D, E, and F pertains. Therefore, we are unable to ascertain the full extent to which FERPA is applicable to this information. However, insofar as the information contained in the submitted documents reveals the identities of students of the district, we agree that FERPA encompasses such information. FERPA also encompasses the entire

contents of any document that was hand-written by a student of the district. See 34 C.F.R. § 99.3 ("personally identifiable information" includes, among other things, "[o]ther information that would make the student's identity easily traceable"), Open Records Decision No. 224 (1979). All of the submitted information that is encompassed by FERPA must be withheld from disclosure, unless the district is authorized to release any of this information under the federal law.

Next, we address the district's arguments under sections 552.101 and 552.102 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the common-law right to privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Section 552.102 of the Government Code protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). This exception is applicable to information that relates to an official or employee of a governmental body. The test of privacy under section 552.102(a) is the same as the test under section 552.101 in conjunction with *Industrial Foundation*. However, because the public has a greater legitimate interest in matters involving officials and employees of governmental bodies, privacy under section 552.102 is limited to information that reveals "intimate details of a highly personal nature." See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). A public employee's job performance does not generally constitute that individual's private affairs. See Open Records Decision No. 470 at 4 (1987). Thus, the scope of a public employee's privacy under section 552.102 is "very narrow." See Open Records Decision No. 400 at 5 (1983).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El Paso 1992, writ denied), the court applied the common-law right to privacy addressed in *Industrial Foundation* to an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. See 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court further held, however, that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the summary must be released under *Ellen*, but the identities of the victims and witnesses must be redacted, and their detailed statements must be withheld from disclosure. *See also* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, all of the information relating to the investigation ordinarily must be released, with the exception of information that would tend to identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from disclosure. Common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

You state that the documents submitted as Exhibits E and F relate to allegations of sexual harassment. Once again, however, you have redacted all of the names of the individuals to whom these documents pertain. Having reviewed those contents of Exhibits E and F that are legible, we agree that most of this information relates to investigations of sexual harassment for purposes of *Ellen*. We also conclude that these documents do not contain adequate summaries of these investigations. Therefore, under *Ellen*, the district must withhold the identities of the victims and witnesses of alleged sexual harassment and must release the remaining information, including the information that identifies the individual accused of sexual harassment. Because you have obliterated all of the individuals' names in Exhibits E and F, it is not clear to this office which of these individuals are the victims and witnesses of sexual harassment whose identities must be withheld. Nevertheless, we have marked a representative sample of what appear to be the names of the victims and witnesses. The district must withhold these types of information under section 552.101 in conjunction with common-law privacy under *Ellen*. The remaining information in Exhibits E and F must be released. Furthermore, the district must not again redact information from documents that it submits to this office in requesting a decision under chapter 552, unless the district has been expressly authorized to withhold that information without requesting an attorney general decision. *See* Gov't Code § 552.301(a); Open Records Decision No. 634 at 6-8 (1995). Otherwise, we will have no alternative but to order the information released.

Section 552.101 of the Government Code also encompasses information that other statutes make confidential. Criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code. Federal law governs the dissemination of CHRI obtained from the NCIC network. Federal regulations prohibit the release to the general public of CHRI that is maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal

history record information to any person or agency that would not be eligible to receive the information itself.”); *see also* Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* ORD 565 at 10-12. Subchapter F of chapter 411 of the Government Code authorizes a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See* Gov’t Code §§ 411.083, .089. Subchapter F also authorizes other types of agencies to obtain CHRI, but only for certain specified purposes. *See also id.* §§ 411.087, .090 *et seq.* Any CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Any CHRI obtained from the Texas Department of Public Safety (the “DPS”) or another criminal justice agency must be withheld as provided by subchapter F of chapter 411 of the Government Code. *See id.* §§ 411.084, .085. Furthermore, if a governmental entity has compiled information that lists an individual as a criminal suspect, arrestee, or defendant, the compiled information takes on a character that implicates the individual’s right to privacy in a manner that the same information in an uncompiled state does not. *See United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Thus, to the extent that the submitted documents contain any criminal history information that is confidential under the federal regulations or subchapter F of chapter 411 of the Government Code, or that is private under *Reporters Committee*, the district must withhold such information under section 552.101 of the Government Code.

Section 552.117(1) excepts from public disclosure the home address, home telephone number, and social security number of a current or former official or employee of a governmental body, as well as information that reveals whether the individual in question has family members, if the current or former official or employee requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). The district may not withhold this information, however, if the current or former official or employee made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We have marked a representative sample of the types of information that section 552.117(1) excepts from disclosure if the information relates to an employee who made a proper election to protect this information under section 552.024.

A social security number also may be confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the submitted documents contain a social security number that the district obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law,

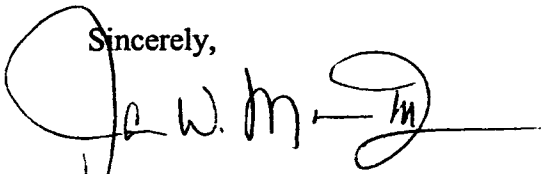
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. W. Morris, III', with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 161605

Enc: Marked documents

c: Ms. Becky Oliver
Fox 4 News
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(w/o enclosures)